No. 90-1284

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In the Supreme Court of the United States

OCTOBER TERM, 1990

INTERCONTINENTAL LIFE INSURANCE COMPANY,
PETITIONER

v.

LOU R. LINDBLOM, RESPONDENT

Petition for a Writ of Certiorari to the Supreme Court of Alabama

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the punitive damages award in this case violates the Due Process Clause because the jury instructions failed to provide any meaningful standards to be employed in setting the amount of the punitive exaction and instead left calculation of the penalty to the jury's unguided discretion.

2. Whether the amount of punitive damages in this case is excessive and disproportionate in violation of the Due Process Clause because it is not rationally related to the purposes of fairly punishing any misconduct that occurred and appropriately deterring such misconduct in the future.

RULE 29.1 STATEMENT

Petitioner InterContinental Life Insurance Company's ("InterContinental") parent corporation is Standard Life Insurance Company, whose parent corporation is InterContinental Life Corporation ("ILCO"). ILCO is controlled by Financial Industries Corporation ("FIC"), through FIC's ownership of 40.4% of ILCO's outstanding common stock and FIC's option to purchase approximately 16.5% of ILCO's common stock. InterContinental has no subsidiaries other than wholly owned subsidiaries.

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LOU R. LINDBLOM, RESPONDENT

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PETITION FOR A WRIT OF CERTIORARI

InterContinental Life Insurance Company respectfully petitions this Court for a writ of certiorari to review the judgment of the Alabama Supreme Court in this case.

OPINIONS BELOW

The opinion of the Alabama Supreme Court (App., *infra*, 1a-19a) is not yet reported.[1] The order of the circuit court (App., *infra*, 20a-26a) is unreported.

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[1] The opinion reprinted in Appendix A is that issued by the Alabama Supreme Court on November 16, 1990. As far as we can determine, that opinion is identical to the original opinion issued on September 28, 1990 and then withdrawn by the Alabama Supreme Court, except for the addition of a deadline for accepting the remittitur (App., *infra*, 16a).

JURISDICTION

The judgment of the Alabama Supreme Court was entered on November 16, 1990. On December 14, 1990, Justice Kennedy issued an order staying the issuance of the Alabama Supreme Court's certificate of judgment pending the timely filing and disposition of a petition for a writ of certiorari. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law * * *.

STATEMENT

The plaintiff in this breach of contract action prevailed on her contention that petitioner InterContinental Life Insurance Company ("InterContinental") failed in bad faith to pay a claim on an insurance policy. As in *Pacific Mutual Life Insurance Co.* v. *Haslip*, No. 89-1279 (argued Oct. 3, 1990), the state court jury's award to the plaintiff included a tremendous helping of punitive damages: the jury supplemented the compensatory award of approximately $10,000 (plus more than $2,000 in interest) with $3,000,000 in punitive damages. The Alabama Supreme Court subsequently ordered a remittitur to $1,000,000.

This certiorari petition seeks vacation of the penalty imposed on petition on two of the federal constitutional grounds that are now pending before the Court in *Pacific Mutual*—(1) that the jury instruc-

tions failed to afford due process because they did not in any way confine or structure the jury's discretion in fixing the amount of the penalty, and (2) that the $1,000,000 award is unconstitutionally excessive because it bears no rational relationship to the purposes for which punitive damages are imposed under Alabama law.

A. Factual Background.

On December 1, 1980, InterContinental issued a $10,000 life insurance policy to Tommie L. Roddenberry, designating Roddenberry's daughter, Lou R. Lindblom, the respondent herein, as the beneficiary. App., *infra*, 2a. Under the payment plan that was selected, payments were due on a quarterly basis, with the first payment due on December 1, 1980. *Ibid.* However, the policy expressly granted a 31-day grace period for late premium payments. *Ibid.* In addition, as a voluntary, non-contractual benefit to its policyholders, InterContinental treated as timely payments that arrived during a further two-week grace period, known as the "courtesy period." *Id.* at 2a-3a, 6a. (Courtesy periods are common in the insurance industry. Tr. 312.) If the courtesy period ended on a weekend or holiday, InterContinental extended the period to the next business day. *Id.* at 3a. Once the courtesy period ended without receipt of the premium, however, the policy was deemed lapsed. Tr. 212, 374-375. InterContinental's policyholders were not apprised of the existence of the courtesy period. App., *infra*, 3a-6a.[2]

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[2] InterContinental used a computer system to track premium payments. Payments accompanied by premium notices were posted in the computer system within seven to ten days of receipt. Tr. 551, 553. Payments might not be posted until

On January 1, 1984, Lindblom (who handled the payments on Roddenberry's policy) wrote to InterContinental asking it to switch the payment schedule from quarterly to monthly, as the policy permitted. App., *infra*, 3a. Together with that request, Lindblom included a payment specifically designated for the December 1983 premium; she asked that InterContinental bill her for the January 1984 premium. *Ibid.* InterContinental applied the payment to the December 1983 premium (Tr. 416) and changed the payment schedule as Lindblom requested. However, InterContinental apparently did not bill Lindblom for the January premium (there is no suggestion in the record that she was entitled to demand such billing), and Lindblom never sent a check designated for the January premium. The next payment received by InterContinental was a check dated February 2, 1984 (Tr. 103), which Lindblom testified was intended to cover the payment due February 1 (Tr. 155). (Nothing in the record indicates that Lindblom instructed InterContinental to apply this payment to the February premium.) Because Lindblom had not paid the January premium, InterContinental applied her check to that past-due premium. App., *infra*, 3a.

Lindblom continued to pay premiums monthly, and InterContinental continued to apply each payment to

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later if received without premium notices, with the wrong payment amount, on weekends, or with a request to change the payment schedule. Tr. 554. Several times a month, InterContinental's computer system generated printouts reporting the status of the premium payments. Tr. 474, 520. One printout ("the final notice run sheet") listed all policies with past-due premiums for which the 31-day grace period had not yet expired. Another printout ("the lapse listing") listed all policies that had lapsed for failure to pay the premiums before the end of the courtesy period. Tr. 470.

the previous month's past-due premium. App., *infra*, 3a-4a. The payments that Lindblom made, beginning with the payment for December 1983, arrived at InterContinental after the end of the 31-day grace period but before the expiration of the courtesy period. *Id.* at 3a. This pattern continued for a year and a half, with Lindblom receiving credit for premium payments through July 1985.

The courtesy period for the payment due August 1, 1985, expired on September 15. Lindblom sent a payment by check dated September 15, 1985, which was not posted until after both the grace and courtesy periods had ended. Tr. 166, 216, 435. InterContinental's computer system flagged the policy as lapsed (Tr. 472, 499-500) and credited the payment to an escrow account pending review of the policy. Tr. 258-259, 505-506. After determining that the policy had lapsed, InterContinental notified Lindblom of that fact. App., *infra*, 4a.[3] At Lindblom's request, Inter-

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[3] Respondent has suggested that other payments had been received by InterContinental after expiration of the courtesy period but had not caused it to lapse the policy. But the record does not support that suggestion. InterContinental posted three payments after the date of expiration, but it apparently had received each of those payments (unlike the payment dated September 15, 1985) before the courtesy period ended. Tr. 409-410, 528. Thus, InterContinental posted the December 1, 1983 payment on January 17 after it completed the paperwork switching the payment from quarterly to monthly and well after it received the payment. Tr. 212, 264, 410, 464-466, 468, 491. InterContinental posted the March payment on April 16th, which was within the courtesy period because April 15, 1984 fell on a Sunday. Tr. 214, 264-265, 410, 493. InterContinental also posted the July 1984 payment (dated August 10, 1984) outside of the courtesy period, on

Continental reviewed its records and confirmed that the policy had lapsed because Lindblom had not paid the premium prior to the end of the courtesy period. Tr. 414-415, 582. InterContinental eventually refunded the payment it held in the escrow account. App., *infra*, 5a.

Roddenberry died on October 23, 1985. App., *infra*, 4a. On November 8, 1985, Lindblom filed a claim with InterContinental for the policy's benefits. Tr. 133-134, 379. (There is no suggestion that InterContinental was aware of Roddenberry's illness prior to the time it terminated the policy. Tr. 216-217, 221, 269, 430.) Because the policy had lapsed almost two months before Roddenberry died, InterContinental denied Lindblom's claim. App., *infra*, 5a.

B. The Proceedings Below.

Lindblom subsequently commenced this action against InterContinental in Alabama state court. She sought $10,000 in compensatory damages (the face value of the policy), interest, and punitive damages. Following a trial, the jury awarded $3,012,400 in compensatory and punitive damages against InterContinental for bad faith failure to pay insurance benefits, breach of contract, misrepresentation, and

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September 7, 1984. Tr. 215-216, 235, 422-423, 494. Because InterContinental posted the payment after the courtesy period expired, InterContinental's computer system generated a lapse notice. The lapse notice was never mailed because InterContinental determined that Lindblom had timely paid the July premium, apparently on the basis of the date on the check or the fact that the payment arrived unaccompanied by a premium notice. Tr. 235, 266-267, 270, 482, 512, 513-514, 594-595.

fraud.[4] The trial court denied InterContinental's motion to set aside the award of punitive damages. App., *infra*, 25a. It specifically rejected InterContinental's claim grounded in the Due Process Clause of the Fourteenth Amendment. *Id.* at 24a-25a.

The Alabama Supreme Court affirmed. App., *infra*, 1a-19a. It refused to recognize InterContinental's courtesy period because "it is not part of the written contract and never became part of the contract. The 'extended grace period' argument, under the facts of this case, appears to be merely a convenient way for InterContinental to justify its acceptance of premium payments outside of the 31-day grace period, insure continued payments, and keep the policy in force, all without the knowledge of the insured or the beneficiary." *Id.* at 7a. Characterizing the courtesy period as a "practice" of "continuously" applying late payments to previously-due premiums, the court held that InterContinental could not "arbitrarily cease this practice and treat the policy as lapsed in August 1985 by claiming that payment was not made within the 31-day grace period." *Ibid.*[5] The court consequently held that InterContinental waived its right to lapse the policy by not doing so when Lindblom failed to make the January payment before the 31-day grace period expired and by accepting payments past the 31-day grace period. *Ibid.*

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[4] Lindblom also had sued the insurance agency that had sold the policy to Roddenberry. The jury found the agency not liable. App., *infra*, 5a-6a.

[5] Of course, InterContinental did not lapse policies on the basis of the 31-day grace period. By holding invalid and then ignoring the courtesy period, the court fundamentally recast the ground relied on by InterContinental in determining that the policy had lapsed.

For these reasons, the court concluded that InterContinental had no right to declare the policy lapsed on the basis of the lateness of the August 1985 payment. It further held that the jury could properly find that InterContinental's failure to pay Lindblom's claim constituted a bad faith refusal under Alabama law. App., *infra*, 14a.

The court specifically considered and rejected InterContinental's challenge to the punitive damages award under the federal Constitution. Relying on its prior decision in *Pacific Mutual*, the court held that "the award is not unconstitutional." App., *infra*, 16a.

Finally, turning to InterContinental's claim that the penalty was excessive as a matter of Alabama law, the court concluded that the award "is excessive and should be reduced by $2,012,400." App., *infra*, 16a. It therefore affirmed the trial court's judgment, conditioned on Lindblom's acceptance of a remittitur in that amount (which Lindblom has accepted).

REASONS FOR GRANTING THE PETITION

The questions presented in this case are essentially identical to those now pending before the Court in *Pacific Mutual Life Insurance Co.* v. *Haslip*, No. 89-1279 (argued Oct. 3, 1990). Accordingly, the Court should hold the petition in this case and dispose of it as appropriate in light of its decision in *Pacific Mutual*.

I. THE JURY WAS NOT GIVEN ANY MEANINGFUL GUIDANCE REGARDING THE STANDARDS TO APPLY IN FIXING THE AMOUNT OF THE PUNITIVE DAMAGES AWARD.

One of the questions before this Court in *Pacific Mutual* is whether "Alabama Law * * * violates Due Process by allowing [a] jury to award punitive dam-

ages as a matter of 'moral discretion,' without adequate standards as to the amount necessary to punish and deter and without a necessary relationship to the amount of actual harm caused." 89-1279 Pet. i. Precisely the same question is presented in this case.

The jury instruction in this case provided no meaningful standards for the jury to apply in selecting the amount of the penalty:

> I mention punitive damages, meaning punishment damages. The purpose of awarding or making an example out of somebody is to allow money recovery to the plaintiff by a way of punishment to the defendant and for the added purpose of protecting the public and others from doing such wrong in the future. The imposition of punitive damages is entirely discretionary by the jury.
>
> Should you award, you must take into consideration the characterization and degree of the wrong as shown by the evidence in the case. And the necessity of preventing similar wrongs. You can only award punitive damages if you have found the defendant guilty of [or?] one or more of them to be guilty of those things that I just read to you which would authorize you to award.

Tr. 833-834. This instruction is virtually identical to the instruction challenged in *Pacific Mutual*. See 89-1279 Pet. Br. 7-8.

The Alabama Supreme Court, relying on its prior decision in *Pacific Mutual*, rejected InterContinental's federal due process claim that the jury instruction was "vague, arbitrary, and imposes no standards or limits." App., *infra*, 15a. Justice Maddox of that court, who dissented in *Pacific Mutual*, recognized that the federal constitutional question in this case is the same as the one presented in *Pacific Mutual*:

> [T]he issue raised in this case is the same as that presented in [*Pacific Mutual*]. Therefore, if the Supreme Court of the United States reverses this Court's judgment in [*Pacific Mutual*], then the judgment in this case should also be reversed. I must await, as everyone else must, the decision of the Supreme Court of the United States in *Pacific Mutual* * * *.

App., *infra*, 18a.

In sum, there can be no doubt that this case turns on the very procedural due process issue now before this Court in *Pacific Mutual*. Indeed, Justice Kennedy implicitly recognized this identity of issues when he granted a stay of the Alabama Supreme Court's judgment in this case. Accordingly, the petition for a writ of certiorari should be held pending the Court's decision in *Pacific Mutual*. If for any reason the issue is not resolved in that case, the Court may wish to grant plenary review here to address the issue.

II. THE PUNITIVE DAMAGES AWARD IS EXCESSIVE AND DISPROPORTIONATE IN VIOLATION OF THE DUE PROCESS CLAUSE.

Another question before this Court in *Pacific Mutual* is whether "the amount of punitive damages in this case was excessive, in violation of [the insurance company's] Due Process right to be free of grossly excessive, disproportionate damages awards." 89-1279 Pet. i. The same constitutional claim is presented here.

To begin with, InterContinental squarely raised this argument below. See, *e.g.*, InterContinental Ala. Sup. Ct. Br. 59-73; InterContinental Ala. Sup. Ct. Reply Br. 28. The Alabama Supreme Court rejected the contention, holding that "the evidence of Intercontinental's conduct warranted the punitive award

here and that that award is not unconstitutional." App., *infra*, 16a.

Moreover, the penalty of nearly $1,000,000 in this case is demonstrably more disproportionate and irrational than the penalty at issue in *Pacific Mutual.*[6] The relevant factors in assessing the constitutionality of a punitive damages award under the Due Process Clause are (1) the relationship between the punitive exaction and comparable statutory penalties prescribed by the legislature; and (2) the relationship between the punitive award and the gravity of the defendant's conduct, including the nature of that conduct, the injury caused by the defendant, and the actual or potential gain to the defendant. Cf. *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2933-2934 (1989) (O'Connor, J., concurring and dissenting); *Solem* v. *Helm*, 463 U.S. 277, 290-300 (1983). So measured, the award here violates due process.

The penalty in this case is much greater than the criminal and civil fines enacted by the Alabama legislature. See Am. Br. for The Business Roundtable, et al. 21-22, *Pacific Mutual Life Insurance Co.* v. *Haslip*, No. 89-1279. The legislatively-prescribed sanction for a corporation convicted of an analogous offense—violation of insurance regulations—is a fine of $10,000. Ala. Code § 27-29-10. Indeed, the highest fine for any offense is $50,000.

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[6] As this Court is aware from the *Pacific Mutual* litigation, Alabama law permits a jury to lump compensatory and punitive damages together in one award. The $3,012,400 awarded in this case unquestionably represented the $10,000 policy benefit, plus interest, and $3,000,000 in puntive damages. The remitted award accordingly must be deemed to be $12,400 in compensatory damages and $987,600 in punitive damages.

In addition, the penalty bears no reasonable relationship whatever to InterContinental's alleged misconduct. First, it is nearly 80 times the compensatory damages awarded to Lindblom. See note 6, *supra*. Courts and commentators have repeatedly suggested a ratio of three times compensatory damages as a rule of thumb for assessing the proportionality of an award of punitive damages. See, *e.g.*, *Maxey* v. *Freightliner Corp.*, 665 F.2d 1367, 1377-1378 (5th Cir. 1982) (en banc); ABA Special Comm. on Punitive Damages, *Punitive Damages: A Constructive Examination* 6-10 to 6-12 (1986). Whether or not there is any specific or fixed ratio required by due process, the presence of a ratio as high as 80:1 is a clear warning sign that the award is likely to be irrationally excessive.

Second, the extraordinary award here is not remotely justified by the nature of InterContinental's conduct. Although the Alabama Supreme Court had the authority to determine that the failure to pay Lindblom's claim constituted "bad faith" as a matter of Alabama law, the enormous penalty imposed on InterContinental cannot rationally serve the purposes of deterrence or punishment in the circumstances of this case. The state court's ruling rests on its conclusion that the company's practice of allowing policyholders an additional two-week courtesy period is legally irrelevant because the practice was not set forth in writing. Insofar as we are able to determine, that ruling constituted a new and unprecedented statement of Alabama law, as evidenced by the fact that no cases were cited to support the proposition. InterContinental's violation of a legal rule that did not exist at the time the company refused to pay Lindblom's claim is grounds for lessening rather than increasing the level of punishment. For the

same reason, a severe punishment cannot be justified on a deterrence rationale.

Significantly, there is no evidence that InterContinental's conduct was designed to obtain some improper benefit at the expense of its policyholders generally or Lindblom in particular. The company did not know of Roddenberry's illness and therefore cannot be deemed to have lapsed the policy in order to avoid paying the death benefit. Moreover, even if InterContinental could be found to have acted in order to avoid paying the death benefit, the nearly $1 million penalty is grossly disproportionate to the size of that benefit.

This is not a case of fraud, breach of trust, or concealed misconduct likely to go undetected and therefore requiring a larger penalty to accomplish appropriate deterrence. Nor does the record support any finding of repeated misconduct threatening injury to significant numbers of people. At worst, one beneficiary may have been unintentionally lulled into a false sense of security in believing the coverage was being maintained despite her failure to pay timely a premium due under the policy. Granting that Alabama possesses the constitutional power to impose punitive damages in such circumstances, the punishment inflicted here is grossly disproportionate to any harm done or to the culpability of the conduct and therefore is entirely irrational.

In sum, the punitive award in this case is excessive and disproportionate, in violation of the Due Process Clause. If this Court in *Pacific Mutual* holds that the Due Process Clause bars excessive and disproportionate punitive damages awards, the judg-

ment below cannot stand.[7] If the due process excessiveness issue remains open in the wake of *Pacific Mutual*, this case would provide an excellent opportunity to address it.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of this Court's decision in *Pacific Mutual Life Insurance Co.* v. *Haslip*, No. 89-1279 (argued Oct. 3, 1990).

Respectfully submitted.

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[7] The foregoing analysis is not affected by the Alabama Supreme Court's conclusion that the $3 million punitive award was excessive as a matter of state law. The court provided no explanation at all for its conclusion that a penalty of nearly $1 million would not be excessive. As we have argued above, such a penalty does violate the Due Process Clause's requirement of rationality.

APPENDICES

APPENDIX A

SUPREME COURT OF ALABAMA
OCTOBER TERM, 1990-91

89-14

INTERCONTINENTAL LIFE INSURANCE COMPANY

v.

LOU RODENBERRY LINBLOM

Appeal from Jefferson Circuit Court
(CV-86-7156)

ON APPLICATION FOR REHEARING
[Filed Nov. 16, 1990]

ADAMS, JUSTICE.

Our opinion of September 28, 1990, is withdrawn and the following is substituted therefor.

This is an appeal from a jury verdict awarding $3,012,400 to the plaintiff, Ms. Lou R. Lindblom, against the defendant, Intercontinental Life Insurance Company (hereinafter "Intercontinental"), for bad faith failure to pay insurance benefits, breach of contract, misrepresentation, and fraud. We affirm.

The appellant has raised many issues on appeal dealing with the denial of its post-trial motions and with questions regarding the constitutionality of the award of punitive damages. The record reveals the following facts relevant to this appeal:

In November 1980 Ms. Tommie Rodenberry applied for a life insurance policy with Intercontinental. Larry Culver of the Culver Agency submitted the application to Intercontinental. On December 1, 1980, Intercontinental issued a term life insurance policy (number 178427) to Tommie Rodenberry. The policy designated Ms. Lou R. Lindblom as the beneficiary of the policy, with $10,000 in benefits. The premium payments were originally due and payable quarterly beginning in December 1980. The policy provided in its relevant parts as follows:

> "PAYMENT OF PREMIUMS—The first premium is due on or before the Policy Date. You may choose to pay your premium at 12, 6, 3, or 1 month intervals. Each payment is due on or before the first day of the payment period. . . .
>
> "The policy shall lapse if premiums are not paid in full when due. Please refer to the 'Grace Period' provision.
>
> "GRACE PERIOD—a grace period of 31 days after the due date will be allowed for payment of each premium after the first, without interest, during which period the policy shall continue in full force. If the insured dies during the grace period, any pro rata premium due and unpaid will be deducted from the amount payable under this policy. This policy will lapse without value at the end of the grace period."

Intercontinental introduced evidence at trial that in addition to the written 31-day grace period, it voluntarily granted an extended two-week (14-day) grace period at the end of the 31-day period, making the total grace

period 45 days. This "extra" grace period was not included in the insurance contract, nor was Ms. Lindblom ever informed of its existence. Intercontinental introduced further evidence that if the end of the grace period fell on a weekend or holiday, the period was extended to the next business day.

From December 1980 through November 1983, Ms. Lindblom made the quarterly payments on the policy. Sometime in December 1983 or January 1984, she decided that she desired to convert the payment plan from the quarterly plan to a monthly plan. On January 1, 1984, she wrote to Intercontinental, informing it of her desire to pay the premiums monthly from then on and enclosing the monthly premium payment specifically designated for December 1983 ($32.06). This letter also stated that she would remit the payment for January 1984 as soon as she received notice from Intercontinental. At that time, the December 1983 payment was 31 days past due. It appeared from the evidence at trial that Intercontinental made no reply to Ms. Lindblom's letter.

Ms. Lindblom's next premium payment was made on February 2, 1984. Intercontinental decided to back-apply this payment to cover the January 1984, payment which was then unpaid and 32 days past due, outside the written 31-day grace period but within the unwritten extended grace period. Ms. Lindblom continued to remit payments each month from February 1984 through October 1985 to Intercontinental. Intercontinental accepted each of these payments.

Evidence offered at trial showed that while Ms. Lindblom made each payment in the early part of each month from February 1984 through October 1985, because of Intercontinental's decision to continuously back-apply these payments to cover the missed January 1984 payment, virtually all of these payments were received outside the 31-day grace period. During this time Intercontinental contacted Ms. Lindblom on at least two oc-

casions to inform her of premium increases. At no time did Intercontinental inform her of the fact that she had missed the January 1984 payment or of the fact that her payments were continuously received outside the 31-day grace period.

Intercontinental continued its practice of back applying Ms. Lindblom's payments through August 1985, when problems began to develop. When Intercontinental received a check dated August 5, 1985, it applied it toward the July 1985 premium, which had not been paid. The next check Intercontinental received was dated September 15, 1985. Again, Intercontinental treated this check as the payment of the August 1985 premium. When this check was entered into the computer system, the computer designated the policy "terminated" and showed "no premium applied." Upon subsequent review of all such computer entries by Intercontinental, employees discovered that the check had not been applied to this policy because the policy had lapsed. Ms. Lindblom, who was at that time unaware of the problem, sent in her payment for October. On October 11, 1985, Intercontinental wrote Ms. Lindblom and informed her of the lapse. Ms. Lindblom, who believed she was current on the policy and could not understand how it had lapsed, contacted Mr. Culver at the Culver Agency about the problem. Ms. Lindblom presented Mr. Culver with copies of the cancelled checks for the August and September 1985 premium payments. Mr. Culver told Ms. Lindblom that he would take care of it. Mr. Culver instructed Ms. Lindblom to send him a copy of the cancelled October 1985 premium check when she received it from her bank. Later, when Mr. Culver received this check and spoke with Ms. Lindblom, he informed her that the policy was still in force.

On October 23, 1985, Tommie Rodenberry died. On November 8, 1985, Ms. Lindblom filed a claim with Intercontinental for the death benefits under the policy.

After Intercontinental personnel examined the claim and the policy, they informed Ms. Lindblom, through the Culver Agency, that the benefits could not be paid because the policy had lapsed as of August 1, 1985, due to nonpayment of premiums. At this point Intercontinental did not refund any premiums paid after the alleged lapse. The Culver Agency contacted Intercontinental on several occasions and sent Intercontinental copies of the cancelled checks for Ms. Lindblom's August, September, and October payments. The Culver Agency apparently believed that the policy should not have lapsed and sought to assist Ms. Lindblom. On each occasion Intercontinental confirmed that the policy had lapsed effective August 1, 1985, and refused to pay the benefits. Intercontinental eventually refunded the amount of two payments received after the alleged lapse.

On November 19, 1986, Ms. Lindblom sued Intercontinental, the Culver Agency, and Mr. Culver, alleging wrongful refusal to pay the benefits under the policy and seeking $10,000 compensatory damages and $1,000,000 punitive damages. Upon Intercontinental's petition, the case was removed to a federal district court. The federal district court, however, found removal inappropriate and remanded the case to the Circuit Court of Jefferson County.

After remand, Ms. Lindblom amended her complaint to allege that the Culver defendants had been guilty of misrepresentation and concealment while acting as agents of Intercontinental. Ms. Lindblom's complaint, in its final form, alleged: breach of contract, bad faith failure to pay on the insurance contract, misrepresentation, fraudulent suppression, outrage, and conversion. Intercontinental moved for summary judgment on all claims. The trial court granted the motion as to the claims of outrage and conversion, but denied it as to the other claims. At the end of the plaintiff's case-in-chief and again at the end of the presentation of all the evidence, Intercon-

tinental moved for a directed verdict, which was denied. After closing arguments, Intercontinental requested a special verdict and requested that the jury be given verdict forms to differentiate compensatory damages from punitive damages. The trial judge denied these requests and submitted the case to the jury.

The jury returned a verdict exonerating the Culver defendants from any liability but assessing damages against Intercontinental in the amount of $3,012,400. Intercontinental timely filed alternative motions for a judgment notwithstanding the verdict, a remittitur, or a new trial. These post-trial motions were denied by the trial court. Because one of the issues raised in the post-trial motions was an alleged excessiveness of the verdict, the trial judge, pursuant to *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986), conducted a hearing on that issue and found no excessiveness.

As noted, Intercontinental has raised several issues for our review on this appeal. At the outset however, we must address the nature of the insurance policy issued by Intercontinental and the actions of the parties involved. An examination of these factors will effectively dispose of the issues raised by Intercontinental, requiring only minimal review. Our consideration of these areas requires a two-step analysis: (1) an examination of the insurance contract itself and (2) an examination of the conduct of the parties.

With respect to the insurance contract, the primary area of concern is with the grace period. As set out above, the insurance contract contains a 31-day grace period for the receipt of insurance premiums. Intercontinental maintains that it voluntarily grants an additional grace period of two weeks (14 days) at the end of the 31-day grace period, making the total grace period 45 days. This additional extended grace period is not mentioned anywhere in the policy, nor was it ever revealed to Ms. Lindblom. In our review of this case and

of the insurance contract, we cannot give any validity to this extended, *unwritten* grace period, as it is not part of the written contract and never became part of the contract. The "extended grace period" argument, under the facts of this case, appears to be merely a convenient way for Intercontinental to justify its acceptance of premium payments outside of the 31-day grace period, insure continued payments, and keep the policy in force, all without the knowledge of the insured or the beneficiary.

Because Intercontinental set up a practice whereby it continuously back-applied some 20 or more payments it received outside the 31-day grace period and made no attempt to treat the policy as lapsed, it could not arbitrarily cease this practice and treat the policy as lapsed in August 1985 by claiming that payment was not made within the 31-day grace period. This Court will not allow Intercontinental to establish such a practice and then to suddenly change it. Allowing such a practice gives Intercontinental virtually absolute power over the contract and leaves persons such as Ms. Lindblom helpless.

Moreover, a plausible alternative reading of the evidence could indicate that the policy actually lapsed in January 1984 when Ms. Lindblom informed Intercontinental that she would remit the January payment as soon as she received notice. Because Intercontinental never notified her as to the change in payment plans, her next check was dated February 2, 1984, and Ms. Lindblom made each subsequent payment on time, including the August and September 1984 payments. We conclude that Intercontinental waived its right to lapse the policy by not doing so when the January payment was overdue and by accepting payments past the 31-day grace period.

Because it impliedly agreed to accept payments made outside the grace period for approximately two years,

Intercontinental could not arbitrarily stop this practice in August 1984. Furthermore, Intercontinental ignored the missed January 1984 payment and back-applied all subsequent payments. With respect to the specific issues Intercontinental now raises on appeal, we have consolidated several issues for clarity and briefly address them below, in light of the foregoing.

Intercontinental raises five issues in this appeal: (1) Whether a judgment notwithstanding the verdict should have been granted for Intercontinental on any of the plaintiff's claims; (2) whether a new trial should have been granted for Intercontinental on the ground that the jury returned a general verdict and at least one of the claims against Intercontinental was insufficient; (3) whether a remittitur or a new trial should have been granted for Intercontinental on the ground that the jury's verdict was necessarily the result of bias, passion, or other improper motive and was otherwise excessive; (4) whether the verdict is unconstitutional under the due process clause of the United States Constitution; and (5) whether a remittitur or a new trial should be ordered by this Court on appeal.

Intercontinental first argues that a judgment notwithstanding the verdict should have been granted in its favor with respect to the plaintiff's claims of breach of contract, bad faith, and misrepresentation. We disagree. Our discussion of Intercontinental's right to a J.N.O.V. will bring into focus our view of Intercontinental's other claims. We begin by stating the standard of review applicable to a denial of a judgment notwithstanding the verdict, as set out by this Court in *Elrod v. Ford*, 489 So. 2d 534 (Ala. 1986):

> "To be entitled to either a directed verdict or J.N.O.V., Defendant must have proved to the trial judge that, from the evidence before the court at the time each motion was made, there was 'a complete

> absence of proof on a material issue or [that there were] no controverted questions of fact on which reasonable people could differ,' and that Defendant was entitled to judgment as a matter of law. *Deaton, Inc. v. Burroughs*, 456 So. 2d 771, 773 (Ala. 1984). Stated conversely, the motions for directed verdict and J.N.O.V. should not have been granted if reasonable inferences in favor of Plaintiff's claims could have been drawn from the evidence or if there was any conflict in the evidence for resolution by a jury. *O'Donohue v. Citizens Bank*, 350 So. 2d 1049 (Ala. Civ. App. 1977)."

489 So. 2d at 537. With regard to each of these claims, the plaintiff has clearly met the burden set out in *Elrod*. Contrary to Intercontinental's argument, the plaintiff presented sufficient evidence to warrant submission of her claims to the jury.

Intercontinental first attacks the plaintiff's breach of contract claim. Intercontinental contends that its actions of accepting payments did not constitute a waiver, because, it says, the company policy was to grant an additional 14-day grace period. We have dealt with this grace period above and only need point out here that the extended grace period has no validity. As for Intercontinental's actions in accepting payments outside the 31-day period, the plaintiff's evidence raised reasonable inferences supporting the argument that Intercontinental did waive any right to "lapse" the policy due to late payments and thereby breached the contract by lapsing the policy and refusing to pay benefits. Furthermore, the evidence could have supported a finding that the policy actually lapsed in January 1984, and that all subsequent payments were made on time, and that because Intercontinental did nothing in January it waived any right to lapse the policy in August. This claim was, thus, properly submitted to the jury.

The second claim Intercontinental attacks is the bad faith claim. Intercontinental argues that even if it was not entitled to a judgment notwithstanding the verdict on the breach of contract claim, it was entitled to one the bad faith claim, because, it argues, the plaintiff's proof in support of her contract claim does not rise to the level entitling the plaintiff to a directed verdict. *National Savings Life Insurance Co. v. Dutton*, 419 So. 2d 1357 (Ala. 1982). In *Dutton*, as Intercontinental correctly points out, Justice Shores stated:

> "In the normal case in order for a plaintiff to make out a prima facie case of bad faith refusal to pay an insurance claim, the proof offered must show that the plaintiff is entitled to a directed verdict on the contract claim."

Dutton, 419 So. 2d at 1362 (citing *National Security Fire & Casualty Co. v. Bowen*, 417 So. 2d 179 (Ala. 1982)). While both parties acknowledge that the plaintiff did not move for a directed verdict, in reviewing the evidence we have come to the conclusion that the plaintiff would have been entitled to a directed verdict; thus the *Dutton* requirement was satisfied. The evidence in support of that claim is overwhelming. Because Intercontinental had no legal justification for refusing to pay the claim, no matter how the evidence is construed, the only reasonable conclusion is that Intercontinental breached the contract when it refused to pay the benefits.

Assuming, arguendo, that the plaintiff would not succeed on a motion for directed verdict, Intercontinental's contention still fails. This Court has addressed this issue on numerous occasions. We have consistently noted that there will be many cases that do not meet the qualification of "normal" or "ordinary" spoken of in *Dutton*, and that in such cases the "directed verdict on the contract claim" test should not apply. *See National Savings Life Insurance Co. v. Dutton*, 419 So. 2d 1357 (Ala. 1982) (Jones J., concurring). *See also Thomas v. Principal Financial*

Group, [Ms. 88-834, August 3, 1990] —— So. 2d —— (Ala. 1990) (wherein Justice Houston undertook an exhaustive analysis of the development of the "directed verdict on the contract claim" test). The case now before this Court is just such a case.

The two elements of a bad faith claim were set out in *Chavers v. National Security Fire & Cas. Co.*, 405 So. 2d 1 (Ala. 1981):

> "[A]n actionable tort arises for an insurer's intentional refusal to settle a direct claim where there is either '(1) no lawful basis for the refusal coupled with actual knowledge of that fact or (2) intentional failure to determine whether or not there was any lawful basis for such refusal.'"

Chavers, 405 So. 2d at 7 (quoting *Vincent v. Blue Cross-Blue Shield of Alabama*, 373 So. 2d 1054 (Ala. 1979)). As mentioned above, *Dutton* established the "great" burden that is on the plaintiff in proving a bad faith claim. *Dutton*, however, qualified the rule regarding this burden so as to prevent the insurer from avoiding liability in certain extreme situations. After *Dutton*, we found it necessary on several occasions to restrict the application of this great burden.

First, in *Continental Assurance Co. v. Kountz*, 461 So. 2d 802, 806 (Ala. 1984), we stated:

> "Second, even if Continental could defeat Kountz's directed verdict on the contract claim, this case is not the 'normal' or 'ordinary' case described in *Dutton*; in an extraordinary case like this the directed verdict standard is inapplicable. *Aetna Life & Cas. Insurance Company v. Lavoie*, 470 So. 2d 1060 (Ala. 1984)."

In *Kountz* we noted that proof of an intentional failure to determine whether there was a lawful basis for denying payment could be used to establish that the insurer had

no legitimate reason to deny the payment. *Kountz*, 461 So. 2d at 807. This Court in *Kountz* held that the evidence showed that the insurer had intentionally failed to determine whether there was a lawful basis for denying the claim, and that that showing supported an inference of bad faith. *Id.* at 808. *See also Aetna Life & Casualty Insurance Co. v. Lavoie*, 470 So. 2d 1060 (Ala. 1984) (extraordinary evidence of "reckless indifference" toward insured in breach of duty of good faith and fair dealing properly submitted to jury).

In *Jones v. Alabama Farm Bureau Mutual Casualty Co.*, 507 So. 2d 396 (Ala. 1986), the only basis of denial rested on the resolution of the single factual issue of what the insured had told the insurance adjuster. In *Jones* we stated:

> "Although the plaintiff's burden of proof in a bad faith action is great, it should not be insurmountable. Precluding a plaintiff's bad faith action by application of the 'directed verdict on the contract claim' test when the disputed factual issue arises solely from a contradicted oral conversation between the insurer and the insured . . . puts too onerous a burden on the plaintiff. Moreover, it would frustrate the purpose of the bad faith action by allowing an insurer simply to misrepresent the content of an oral conversation to avoid liability."

Jones, 507 So. 2d at 401. *Jones* held that it was error to grant a partial summary judgment because there was a disputed factual issue to be decided by the jury. *Id. See also United American Insurance Co. v. Brumley*, 542 So. 2d 1231 (Ala. 1989) (it would frustrate the purpose of the bad faith action to allow an insurer to prevent a bad faith claim from going to the jury by misrepresenting the content of oral or written communications). The case now before us presents an analogous "extraordinary" situation. Intercontinental, over the course of nearly two years, accepted and back-applied payments outside of the

grace period and made no effort to investigate Ms. Lindblom's payment history or to inform her of possible lapses. Moreover, there was conflicting testimony as to whether any "pre-lapse" notices were sent to Ms. Lindblom. At trial, Intercontinental employees testified that such notices were sent, while Ms. Lindblom denied ever receiving them. Under the facts of this case, the existence or nonexistence of these notices raises a presumption in favor of the plaintiff's argument that Intercontinental intentionally ignored late payments in order to keep the policy in force, to guarantee continued payments, and failed to determine if there was any valid reason for denying the claim. Finally, we note that the evidence tended to show that Intercontinental employees, upon reviewing the denial of the claim, merely consulted a computer or other employees and reported that the policy had lapsed due to nonpayment of premiums. This effort by Intercontinental is wholly insufficient to amount to an investigation into the basis for the denial of payments. Intercontinental has not only intentionally failed to investigate whether there was a valid reason to deny the claim, but has also failed to investigate any part of the policy at any time. Under *Kountz* and *Aetna*, this intentional failure to investigate whether there was a valid reason to deny the claim amounts to an intentional failure to determine whether there was any lawful basis for denying the claim and creates the inference of bad faith.

Furthermore, considering *Jones* and *Brumley*, we note that the action of bad faith would be frustrated by permitting Intercontinental to avoid liability merely by misrepresenting the existence or the content of pre-lapse notices. The resolution of the issue whether these notices were sent to Ms. Lindblom, is partly determinative of Intercontinental's investigation practices throughout the existence of this policy. These facts illustrate why this case is anything but ordinary or normal. The facts presented a question whether Intercontinental investigated to determine if there was a valid reason to deny payment

of benefits, and that question was properly submitted to the jury for resolution. We hold, therefore, that the *Dutton* "directed verdict on the contract claim" test does not apply here and that the trial judge properly submitted the bad faith claim to the jury.

Intercontinental also attacks the denial of a judgment notwithstanding the verdict on the misrepresentation claim. Here again, Intercontinental argues that the plaintiff made no showing of any misrepresentation. Contrary to Intercontinental's interpretation of the facts, the record contains numerous examples of misrepresentations to Ms. Lindblom. The actions of Intercontinental in continuously accepting late payments and its taking no steps to advise Ms. Lindblom of this fact or to advise her of its so-called extended grace period, as well as the actions of the Culver Agency, all create reasonable inferences to support the plaintiff's claim of misrepresentation. Thus, we hold that the trial judge properly submitted this claim to the jury for resolution.

The next issue raised by Intercontinental is whether a new trial should have been granted in its favor on the ground that the jury returned a general verdict and at least one claim against Intercontinental was insufficient. Intercontinental argues that if it was entitled to a directed verdict on any one or more of the plaintiff's five claims submitted to the jury, then the verdict must be set aside and a new trial ordered. In short, we are of the opinion that Intercontinental was not entitled to a directed verdict on any of the five claims. The plaintiff's evidence presented differing interpretations and raised reasonable presumptions in her favor. The trial judge properly denied Intercontinental's motion for a directed verdict and submitted the claims to the jury. Furthermore, we see no error in the general form of the jury verdict.

Intercontinental next argues that a new trial or a remittitur should have been granted for Intercontinental because, it says, the jury verdict was necessarily the

result of bias, passion, or other improper motive and was otherwise excessive. We disagree with both of its arguments.

After the jury returned the verdict, the trial judge entered his findings regarding questions of alleged excessiveness of the verdict, pursuant to *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986). After carefully reviewing the evidence before the jury, the trial judge concluded that the evidence clearly established that Intercontinental's conduct warranted the punitive award.

As for a motive for the jury to give an excessive verdict, Intercontinental maintains that the conduct of the plaintiff at trial in, among other things, testifying as to the nature of Ms. Rodenberry's illness, the presence of Ms. Lindblom's retarded son, and testifying that Ms. Lindblom remained at home to care for Ms. Rodenberry caused the jury to disregard the legal requirements applicable to Ms. Lindblom's claim and to decide the case out of passion and pity for Ms. Lindblom's situation. This argument is unpersuasive. Much of the testimony that Intercontinental now cites as error was either elicited by counsel for Intercontinental or was not objected to at the time the testimony was given. Furthermore, much of what Intercontinental claims caused the jury to abandon its duty to decide the case on legal grounds does not, as we see it, rise to a level that could have affected the jury in the manner Intercontinental contends. This is an extreme case. Much of the testimony Intercontinental now attacks is relevant and was properly put before the jury in order for it to make an informed decision.

Intercontinental next attacks the jury verdict as unconstitutional. Specifically, Intercontinental argues that the law of punitive damages lacks fundamental fairness because it is vague, arbitrary, and imposes no standards or limits. However, as Intercontinental correctly points out, the Supreme Court of the United States held in *Browning-Ferris Industries of Vermont, Inc. v. Kelco*

Disposal, Inc., —— U.S. ——, ——, 109 S.Ct. 2909, 2916 (1989), that the excessive fines clause of the eighth amendment does not apply to punitive damages awards in cases between private parties. This Court has, in line with *Browning-Ferris*, consistently declined to hold that the award of punitive damages is unconstitutional. *See HealthAmerica v. Menton*, 551 So. 2d 235 (Ala. 1989), cert. denied, —— U.S. ——, 110 S. Ct. 1166 (1990); *Olympia Spa v. Johnson*, 547 So. 2d 80 (Ala. 1989); *Pacific Mutual Life Insurance Co. v. Haslip*, 553 So. 2d 537 (Ala. 1989), cert. granted, —— U.S. ——, 110 S. Ct. 1780 (1990). Also, the trial judge carefully reviewed the evidence presented and the constitutional arguments raised and concluded that the award did not violate the Constitution. We agree with the trial court that the evidence of Intercontinental's conduct warranted the punitive award here and that that award is not unconstitutional.

Last, Intercontinental renews its argument before this Court that the award of $3,012,400.00 is excessive and urges this Court to order a remittitur pursuant to Ala. Code 1975, § 12-22-71. The trial court followed the *Hammond* guidelines and found no reason to disturb the jury verdict. However, this Court still has the responsibility to consider whether the award is excessive, because we must assure some degree of uniformity in the area of punitive awards.

After a thorough examination of the record in this case and a comparison of verdicts in similar cases that have come before this Court, we conclude that the award of $3,012,400 is excessive and should be reduced by $2,012,400. We therefore affirm the judgment of the trial court, conditioned upon the acceptance of a remittitur of $2,012,400 by Ms. Lindblom, within 28 days of the date of this substituted opinion, which will result in a judgment in her favor of $1,000,000.

ORIGINAL OPINION WITHDRAWN; OPINION SUBSTITUTED; AFFIRMED CONDITIONALLY; APPLICATION OVERRULED.

Hornsby, C. J., and Jones, Almon, Shores, Houston, and Steagall, JJ., concur.

Maddox, J., concurs specially.

Kennedy, J., concurs in part and dissents in part.

MADDOX, JUSTICE (concurring specially).

I agree that under this Court's present case law the punitive damages award, as remitted, must be affirmed. However, I must point out that I dissented in *Pacific Mutual Life Ins. Co. v. Haslip*, 553 So. 2d 537 (Ala. 1989), cert. granted, —— U.S. ——, —— S.Ct. —— (1990), and that the issue raised in this case is the same as that presented in *Haslip*. Therefore, if the Supreme Court of the United States reverses this Court's judgment in *Haslip*, then the judgment in this case should also be reversed. I must await, as everyone else must, the decision of the Supreme Court of the United States in *Pacific Mutual Life Ins. Co. v. Haslip*.

KENNEDY, JUSTICE (concurring in part and dissenting in part).

The jury returned a verdict favoring Ms. Lindblom, and the trial court entered a judgment on that verdict. The trial court denied Intercontinental's motion for judgment notwithstanding the verdict and conducted a hearing, pursuant to *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986), in which it determined that the verdict was not excessive. A jury's verdict is presumed correct and will not be disturbed unless plainly it is erroneous or manifestly unjust. *United American Insurance Co. v. Brumley*, 542 So.2d 1231, 1233 (Ala. 1989); *Pate v. Sunset Funeral Home*, 465 So.2d 347 (Ala. 1984). That presumption of correctness is strengthened when a motion for new trial is denied by the trial court. *Brumley*, at 1233; *Hill Air of Gadsden, Inc. v. Marshall*, 526 So.2d 15, 17 (Ala. 1988). A remittitur is proper only when the record establishes that the award is excessive as a matter of law or that the verdict is based upon bias, passion, corruption, or other improper motive. *Hammond*, at 1379.

The record does not indicate that the jury's verdict was in any way improper. To apply properly the presumption of correctness that attends the jury's verdict requires that the judgment of the trial court in regard to liability be affirmed; the majority does affirm in that regard. I concur in the portion of the opinion that affirms the judgment as to liability. However, the record does not establish that the award was either excessive or based upon bias, passion, corruption, or any other improper motive; the trial court did not err in denying a remittitur. Accordingly, I dissent from the portion of the opinion that orders a remittitur.

APPENDIX B

IN THE CIRCUIT COURT
FOR JEFFERSON COUNTY, ALABAMA

Civil Action No. CV86-7156

LOU R. LINDBLOM,
Plaintiff

v.

INTERCONTINENTAL LIFE INSURANCE COMPANY, *et al.*,
Defendant

ORDER ON MOTION FOR JUDGMENT NOTHWITHSTANDING VERDICT OR, ALTERNATIVELY, MOTION FOR NEW TRIAL

1. The defendant's Motion For Judgment Notwithstanding Verdict Or, Alternatively, Motion For New Trial, is denied and overruled. The defendant's request for remittitur is denied and overruled.

2. One of the grounds of defendant's motion is that the verdict was excessive. The trial court is commanded by *Hammond v. City of Gadsden*, 493 So2d 1374 (1986); *Jawad v. Granade*, 497 So2d 471 (1986) and succeeding cases to conduct a hearing on the factors considered in either granting or denying a Motion For New Trial alleging excessiveness, or with respect to remittitur. The Court has carefully studied the body of Alabama law regarding damages and remittitur:

> "The trial court may not substitute its own judgment for that of the jury in determining whether to grant a remittitur.

"The authority to disturb a jury verdict on the ground of excessive damages is one which should be exercised with great caution.

"A remittitur may be ordered in those cases where the court can clearly see that the verdict has been reached because of bias, passion, prejudice, corruption or other improper motives.

"The right to a trial by jury is a fundamental, constitutionally guaranteed right, Article 1, Section 2, Constitution of 1901, and, therefore, a jury verdict may not be set aside unless the verdict is flawed, thereby losing its constitutional protection.

"A jury verdict may be constitutionally flawed because it results, not from the evidence and applicable law, but from bias, passion, prejudice, corruption, or other improper motives.

"The cases have consistently held that in deciding whether a jury verdict is excessive because it is the result of passion, bias, corruption, or other improper motive, a trial judge may not substitute his judgment for that of the jury.

"Only where the record establishes that the award is excessive as a matter of law, or where it is established and reflected in the record that the verdict is based upon bias, passion, corruption, or other improper motive, may a trial court order a new trial or remittitur.

"Alabama Courts do not favor setting aside jury verdicts unless justice demands it, and the Supreme Court has warned repeatedly that the authority vested in courts to disturb a jury's verdict on the ground of excessiveness should be exercised in great caution.

"To permit a trial judge to substitute his judgment on the facts for that of the jury, or to give undue

presumption to the action of the trial judge in dealing with verdicts, would minimize the jury system (and render) juries advisors of the trial judge rather than a positive force in the administration of justice.

"Whether remittitur of a new trial should be granted on the grounds of excessiveness, the Alabama Supreme Court has said that neither remittitur nor a new trial is appropriate unless the verdict results from bias, passion, prejudice, or corruption or other improper motive. This strict standard, when the courts adhere to it, discourages judges from unnecessarily tampering with jury verdicts and thereby minimizes the potency of the argument that remittitur merely substitutes judicial opinion for jury opinion."

3. This Court carefully conducted the voir dire examination and observed the parties and their respective counsel along with the jury's reaction during the trial. The trial of the case was conducted on a highly professional level by competent, seasoned advocates for both sides. Frivolity was not present at the trial of this case. The jury recognized the seriousness of the issues that were being presented for their determination. At no time did it seem or appear to the Court that any part in this case received less than a fair, impartial trial before the jury.

4. This was a case stating actions in contract, fraud and tort of bad faith. Testimony from defendant's own employees that it accepted premium payments outside of the written thirty-day grace period contained in the policy of insurance involved in excess of twenty times. The court noted the reaction of the jury to the evasive and inconsistent testimony of defendant's corporate representative, James Grace, and its employee, Mary Newman. The Court observed the expert, and uncontradicted testimony presented on behalf of the plaintiff by Ed Trow-

bridge of Metropolitan Life. He testified that there was no legitimate basis for denying the claim involved in this case and that defendant's actions in reviewing and refusing to pay the claim at issue were in violation of accepted procedures and practices in the insurance industry. This court also heard inconsistent testimony from defendant's employees and representatives regarding whether defendant ever established or followed a policy of sending written "pre-lapse notices" to customers, including the plaintiff, prior to the date the claim involved was denied. Defendant failed to produce any documentation or proof to support the testimony of its employee, Mary Newman, that such "pre-lapse notices" were sent to the plaintiff at any time. At no point during the trial of this case did Intercontinental nor any of its corporate officers admit any wrongdoing. From the facts, this court is reasonably satisfied that the insurance company deliberately or recklessly suppressed material facts from the plaintiff prior to the death of Tommie Rodenberry; and, this court is reasonably satisfied that the insurance company had no legitimate basis for denying the claim made the basis of this suit and/or failed to properly investigate the Lindblom claim and subject the results of the investigation to cognitive evaluation and review.

5. The amount of a civil fine or exemplary damages is largely left to the discretion of the jury. Alabama Law allows juries to fix punitive damages. This court knows of no reason why there should be any judicial invasion into the function of the jury under the facts in this case. The court finds nowhere in the record where it is established that the award is excessive because it is based upon bias, passion, corruption or other improper motive.

6. In addition to the above, the court has also considered those factors listed by the Supreme Court in *Hammond, supra,* as being appropriate for the trial court to consider. With regard to the culpability of the defendant's conduct, the evidence clearly established that

the conduct of the defendant justified a punitive award. The evidence presented was also sufficient to establish that defendant's actions or inactions were against recognized and accepted insurance industry standards.

The insurance industry should be discouraged from placing their interests above that of their customers when processing claims and adjusting insurance policies. Insurance companies are in a position to have knowledge and information which the lay person does not have.

The defendant has argued that the verdict in this case will adversely impact the insurance company. Any verdict for any party will have an adverse impact to some extent. The court does not find that this verdict on the defendant is such that would require a reversal of the jury's decision as to damages. In line with that same reasoning, the court does not find that the impact on innocent third parties is of such significance or consequence so as to reverse the jury's determination of damages.

7. The defendant raised Federal constitutional questions, in every possible and conceivable way and manner, during the trial of the case and on all post-judgment motions. In substance, defendant claims the award of damages in this case violates the due process clause of the United States Constitution in that

a. the award of punitive damages was committed solely to the authority and standardless discretion of the jury, *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 77, 78-79 (1988) (O'Connor, J., concurring);

b. the standardless discretion of the jury in awarding punitive damages constitutes arbitrary action of the government, which is forbidden by the due process clause of the United States Constitution, *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 57 U.S.L.W. 4985, 4991-92 (U.S. June 26, 1989) (Brennan, J., concurring); and

c. the unbridled discretion of the jury in awarding punitive damages in this case amounts to unconstitutional vagueness and procedural due process violation, *Id.* at 4992 (O'Connor, J., concurring).

The court considered the constitutional issues when raised by defendant, both during the trial of the case and during the post-judgment arguments. This Court holds that the award by this jury of punitive damages did not violate the due process clause of the United States Constitution.

8. On post-judgment motion defendant submitted a sparse affidavit which says by implication that the verdict against the defendant would adversely impact the insurance company because its net income has been reduced. Yet, plaintiff, in post-judgment hearing, introduced annual statements of defendant filed with State of Alabama Department of Insurance showing that the defendant has millions and millions of dollars in assets. Therefore, this court finds that *Green Oil Co. v. Hornsby*, 539 So2d 218, does not apply. In *Green Oil* the trial judge on post-judgment *Hammond* motion had evidence of the company's and partners' worth and he found the punitive damages award was excessive because of its effect upon Green Oil and the partners. In the Supreme Court's words: "The Green Oil Company overcome the presumption of correctness that attached to the jury's award of punitive damages."

This court finds that this defendant did not overcome said presumption of correctness and the trial verdict stands.

9. It is therefore ORDERED, ADJUDGED AND DECREED that defendant's Motion For Judgment Notwithstanding The Verdict Or, In The Alternative, For A Remittitur Or New Trial is denied and overruled.

All court costs taxed against said defendant.

DONE AND ORDERED this the 1st day of September, 1989.

/s/ Josh Mullins
JOSH MULLINS
Circuit Judge

cc: All counsel of record

Supreme Court, U.S.
FILED
MAR 14 1991
OFFICE OF THE CLERK

No. 90-1284

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

INTERCONTINENTAL LIFE INSURANCE COMPANY,
Petitioner,

v.

LOU R. LINDBLOM,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review a due process challenge to the imposition of punitive damages in an Alabama case in which the award was subject to the same array of procedural protections reviewed and approved by this Court in *Pacific Mutual Life Insurance Co. v. Haslip*, —— U.S. —— (1991), and where the Supreme Court of Alabama, in applying those protections, reduced the jury award by over $2 million dollars (more than two-thirds of the verdict).

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Constitutions and Statutes:

Ala. Code §§ 6-11-20 through 6-11-30 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1284

INTERCONTINENTAL LIFE INSURANCE COMPANY,
Petitioner,

v.

LOU R. LINDBLOM,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner InterContinental Life's statement of the case omits crucial facts. A closer review of the factual record, the jury charge given, and the standards applied by the trial court and Alabama Supreme Court makes clear that the punitive damage award in this case does not violate the Due Process Clause.

A. Factual Background.

Respondent, Lou R. Lindblom, adopts the statement of the case and statement of the facts set forth in the opinion issued in this case by the Alabama Supreme Court. Brief for Petitioner, App., at 1a-19a. In addition, respondent states the following facts.

On December 1, 1980, InterContinental issued a $10,000 life insurance policy to Tommie L. Rodenberry, designating Rodenberry's daughter, Lou R. Lindblom, the respondent herein, as the beneficiary. Brief for Petitioner, App., at 2a. Under the payment plan that was selected, payments were due on a quarterly basis, with the first payment due on December 1, 1980. *Id.* On January 1, 1984, Ms. Lindblom, who handled the payments on her mother's policy, wrote to InterContinental asking it to switch the payment schedule from quarterly to monthly, as the policy permitted. Brief for Petitioner, App., at 3a. Togther with that request, Ms. Lindblom included a payment designated for the December, 1983, premium. She also asked to be billed monthly for the policy and requested that InterContinental bill her for the January, 1984, premium. *Id.* InterContinental never replied to this letter and never sent a notice for the Jauary, 1984, payment. Tr. 101. On February 2, 1984, Ms. Lindblom mailed another payment to InterContinental, Tr. 103, which Ms. Lindblom testified was intended to cover the payment due February 1. Tr. 155. InterContinental made a unilateral decision to "back-apply" the February 2 check to cover the January premium for which InterContinental had never sent a notice. Brief for Petitioner, App., at 3a. It was at that point in time—January, 1984—some 22 months prior to the death of Tommie Rodenberry, that the problem, which led to InterContinental's eventual denial, began. Simply stated, because she was never billed, Ms. Lindblom did not remit the January, 1984, premium payment. Tr. 87-88.

Each month thereafter, from February 1, 1984, through October, 1985, Ms. Lindblom remitted a payment payable to InterContinental early each month. Tr. 86, 88, 89, 102-09. No fewer than three of InterContinental's employees admitted during the trial that every one of these 20 monthly payments was accepted by InterContinental outside of the written 31-day grace period

contained in the policy, Tr. 207, 528, 606, because InterContinental had decided to continuously back apply these payments to cover the missed January, 1984, payment. Brief for Petitioner, App., at 3a. Ms. Donna Faulkner, one of two InterContinental employees involved in the claim denial, admitted that Ms. Rodenberry's policy technically lapsed each and every month beginning in December, 1983. Tr. 427, 608.[1] During this time, InterContinental contacted Ms. Lindblom on at least two occasions to inform her of premium increases. At no time did InterContinental inform her that she had missed the January, 1984, payment, that her payments were routinely received outside the 31-day grace period, or that the policy was in a continual state of lapse. Brief for Petitioner, App., at 3a-4a; Tr. 119, 299-300, 609-10, 614-17.[2]

InterContinental introduced evidence at trial that in addition to the written 31-day grace period, it voluntarily granted an extended two week (14-day) grace period, making the total grace period 45 days. Brief for Petitioner, App., at 2a-3a. This "extra" grace period was not included in the insurance contract, and InterContinental never informed Ms. Lindblom of its existence. *Id.* at 3a. InterContinental has incorrectly suggested to this Court that no payments were ever accepted on the policy at issue outside of the 14-day "extra" grace period.[3] But in fact, at least three premium payments were accepted by InterContinental outside of the additional 14-day "ex-

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[1] Ms. Faulkner agreed that, between January, 1984, and October, 1985, InterContinental could accept the premium payments and retain the right to deny payment of benefits in the event of Tommie Rodenberry's death. Tr. 608.

[2] Failure to provide such "pre-lapse" notification was a violation of InterContinental's own procedures. Tr. 527-28.

[3] *See* Brief for Petitioner, at 5.

tra" grace period prior to the death of Tommie Rodenberry. Tr. 213-15, 219, 264-66, 273, 409-10, 425, 472, 491, 493-94, 496, 513, 532. Payments were accepted by InterContinental outside of both the written and "unwritten" grace periods in January, 1984; April, 1984; and July, 1984. Tr. 213-15. At no time did InterContinental require reapplication or completion of any written forms, including medical information, to reinstate the policy.

InterContinental continued its practice of back applying Ms. Lindblom's payments through August, 1985, when problems began to develop. Brief for Petitioner, App., at 4a. When InterContinental received a check dated August 5, 1985, the company applied it toward the July, 1985, premium. *Id.* When InterContinental received the next check, dated September 15, 1985, it treated this check as the payment of the August, 1985, premium. *Id.* In early October, 1985, Ms. Lindblom, who was still unaware of the problem, sent yet another payment to InterContinental. *Id.* On October 11, 1985, InterContinental wrote Ms. Lindblom and informed her that the policy had lapsed. *Id.* Ms. Lindblom, believing that she was current on the policy and not understanding how it had lapsed, contacted Mr. Culver at the Culver Agency about the problem.[4] Ms. Lindblom presented Mr. Culver with copies of the cancelled checks for the August and September, 1985, premium payments. *Id.* Mr. Culver told Ms. Lindblom that he would take care of the problem and instructed Ms. Lindblom to send him a copy of the cancelled October, 1985, premium check when she received it from her bank. *Id.* Later, when Mr. Culver received this check and spoke with Ms. Lindblom, he informed her that the policy was still in force. *Id.*

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[4] Culver was an InterContinental agent from whom Ms. Lindblom had purchased the policy at issue. Tr. 387-88, 390.

On October 23, 1985, Tommie Rodenberry died. Ms. Lindblom filed a claim with InterContinental for the death benefits under the policy. Brief for Petitioner, App., at 4a. InterContinental informed Ms. Lindblom that benefits could not be paid because the policy had lapsed as of August 1, 1985, due to non-payment of premiums. *Id.* at 5a. At this point, InterContinental did not refund any premiums paid after the alleged lapse. *Id.* In fact, InterContinental had continued to cash Ms. Lindblom's premium payment checks after August 1, 1985.[5] Tr. 125, 142. The Culver Agency contacted InterContinental on several occasions and sent InterContinental copies of the cancelled checks for Ms. Lindblom's August, September, and October payments. *Id.* InterContinental nevertheless continued to refuse to pay the benefits. *Id.* InterContinental eventually refunded the amount of two payments ($71.64) received after the alleged lapse. *Id.* This refund was forwarded more than 90 days after InterContinental sent its "lapse notice" (October 11, 1985) and more than five months after InterContinental claimed the policy had lapsed (August, 1985). Tr. 125, 142.

B. The Jury Verdict.

The jury was charged that it could award compensatory damages for both out-of-pocket economic loss and mental anguish. Tr. 831. The jury was also instructed that could award punitive damages. The jury returned a verdict for the respondent in the amount of $3,012,400. Because this was a general verdict, the extent to which the award represented compensation for mental anguish and the extent to which it represented punitive damages cannot be determined with certainty.

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[5] One check was cashed by InterContinental on October 21, 1985, two days before the death of Tommie Rodenberry. Plaintiff's Exhibit 26.

C. Review by the Alabama Courts.

The trial court carefully reviewed the jury damage award. In particular, the court applied the standards and followed the procedures set forth by the Alabama Supreme Court in *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986) and *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989), in determining whether the award was appropriate. In conformity with Alabama law, the court held a hearing, considered the relevant substantive criteria identified by the Alabama Supreme Court, and set forth in great detail its reasons for upholding the award. Brief for Petitioner, App., at 20a-26a. The trial court noted "the expert, and uncontradicted testimony . . . that there was no legitimate basis for denying the claim involved in this case and that defendant's actions in reviewing and refusing to pay the claim at issue were in violation of accepted procedures and practices in the insurance industry." It found that "the evidence presented" was "sufficient to establish" that petitioner's actions "were against recognized and accepted insurance industry standards." Brief for Petitioner, App., at 22a-23a. The trial court also noted that the testimony of petitioner's witnesses was "evasive and inconsistent" and that the petitioner "deliberately or recklessly suppressed material facts from the plaintiff prior to the death of Tommie Rodenberry; and, this court is reasonably satisfied that the insurance company had no legitimate basis for denying the claim made the basis of this suit." *Id.* at 23a.

The Alabama Supreme Court found that the trial court had conducted a "careful" *Hammond* review and found the jury's punitive award to have been appropriate under the *Hammond/Hornsby* standards. Brief for Petitioner, App., at 15a. Nevertheless, Alabama law gives parties challenging punitive awards a third level of protection. In addition to applying *Hammond* and *Hornsby* the Alabama Supreme Court also conducts a "comparability re-

view" in order to ensure that the award is not disproportionate to punitive awards in similar cases. Brief for Petitioner, App., at 16a. After "a thorough examination of the record in this case and a comparison of verdicts in similar cases that have come before this court," the Alabama Supreme Court decided to reduce the jury award from $3,012,400 to $1,000,000, a reduction of over $2,000,000 (more than two-thirds of the verdict). *Id.*

REASONS FOR DENYING THE WRIT

The questions presented in this case are identical to those decided by the Court in *Pacific Mutual Life Insurance Co. v. Haslip*, —— U.S. —— (1991). Accordingly, the Court should deny the petition in this case in light of its decision in *Haslip*. The Alabama law applied in this case did not permit awards of punitive damages in the "unbridled discretion" of the jury nor—as the Alabama Supreme Court found applying strict state law standards—was the punitive damage award, as reduced, excessive or disproportionate. Therefore, petitioner is erroneous in its contention that the punitive award violated due process. The very same procedural safeguards that were reviewed and approved by the Court in *Haslip* —adequate jury instructions, a thorough post-verdict hearing by the trial court, and appropriate review by the Alabama State Supreme Court—were utilized in this case. Furthermore, this case demonstrates that the Alabama system works as evidenced by the substantial reduction of the award by the Alabama Supreme Court.[6]

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[6] The legal standards applied in this case, and approved by the Court in *Haslip*, have been superseded by a legislative enactment. Specifically, in 1987, Alabama enacted tort reform legislation placing even greater substantive and procedural constraints on punitive awards. Ala. Code §§ 6-11-20 through 6-11-30. Although these legislative provisions do not apply to the present case, they have been in force in Alabama for more than two years and will govern all present and future actions raising punitive damages' claims like those at issue here. Thus, plenary review of this case is also inap-

THE JURY WAS GIVEN ADEQUATE GUIDANCE REGARDING THE STANDARDS TO APPLY IN FIXING THE AMOUNT OF THE PUNITIVE DAMAGE AWARD AND THE AWARD IS NOT EXCESSIVE AND DISPROPORTIONATE IN VIOLATION OF THE DUE PROCESS CLAUSE.

InterContinental's due process attack is twofold. First, InterContinental argues that the jury was not given any meaningful guidance regarding the standards to apply in fixing the amount of the punitive damage award.[7] The second question raised by InterContinental is whether "the amount of punitive damages in this case was excessive, in violation of [the insurance company's] due process right to be free of grossly excessive, disproportionate damage awards."[8] Petitioner admits that both questions presented in this case are "essentially identical" to those decided by the Court in *Haslip*.[9]

It is beyond cavil that InterContinental had the benefit of the same "full panoply of Alabama's procedural protections"[10] that were reviewed and approved by the Court in *Haslip*. InterContinental, in support of its "lack of meaningful guidance" argument, first attacks the jury instruction given. Yet even InterContinental admits that the jury instruction in this case is virtually identical to the instructions challenged in *Haslip*.[11] As in *Haslip*, the trial court expressly described for the jury the purpose of punitive damages, namely, "to allow money re-

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propriate because the Court would be reviewing a system for assessing punitive damages that no longer exists in Alabama or anywhere else.

[7] *See* Brief for Petitioner, at 8-9.

[8] *See* Brief for Petitioner, at 10.

[9] *See* Brief for Petitioner, at 8.

[10] *See* Pacific Mutual Life Insurance Co. v. Haslip, —— U.S. —— (slip op. 19).

[11] *See* Brief for Petitioner, at 9.

covery to the plaintiff by a way of punishment to the defendant" and "for the added purpose of protecting the public and others from doing such wrong in the future." Tr. 833-34; Brief for Petitioner, at 9. As in *Haslip*, any evidence of InterContinental's wealth was excluded from the trial in accordance with Alabama law. See *Southern Life and Health Ins. Co. v. Whitman*, 358 So. 2d 1025, 1026-1027 (Ala. 1978).

After a careful review of virtually identical instructions in *Haslip*, this Court stated:

> To be sure, the instructions gave the jury significant discretion in its determination of punitive damages. But that discretion was not unlimited. It was confined to deterrence and retribution, the state policy concerns sought to be advanced. And if punitive damages were to be awarded, the jury "must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong." App. 106. The instructions thus enlighten the jury as to the punitive damages' nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory.
>
> These instructions, we believe, reasonably accommodated Pacific Mutual's interest in rational decisionmaking and Alabama's interest in meaningful individualized assessment of appropriate deterrence and retribution. The discretion allowed under Alabama law in determining punitive damages is no greater than that pursued in many familiar areas of the law as, for example, deciding "the best interests of the child," or "reasonable care," or "due diligence" or appropriate compensation for pain and suffering or mental anguish. . . .

—— U.S., at —— (slip op. 16).

In light of *Haslip*, there can be no doubt that the jury instruction in this case provided adequate standards for

the jury to apply in selecting the amount of the penalty. Therefore, due process is satisfied.

As in *Haslip*, the trial court here conducted a post-verdict hearing that conformed with *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala.), which sets forth standards that ensure meaningful and adequate review of punitive awards. In *Haslip*, this Court reviewed the *Hammond* test and found it to ensure "meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages." *Haslip, supra* at —— (slip op. 17). This Court stated:

> Before the trial in this case took place, the Supreme Court of Alabama had established post-trial procedures for scrutinizing punitive awards. In *Hammond v. City of Gadsden*, 493 So. 2d 1374 (1986), it stated that trial courts are "to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages." Among the factors deemed "appropriate for the trial court's consideration" are the "culpability of the defendant's conduct," the desirability of discouraging others from a similar conduct," the "impact upon the parties," and "other factors, such as the impact on innocent third parties." The *Hammond* test ensures meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages.

Id., (citations omitted).

Subsequent to *Hammond* but prior to appeliate review of the verdict at issue here, the Alabama Supreme Court had elaborated and refined the *Hammond* criteria for determining whether a puntive award is reasonably related to the goals of deterrence and retribution. It was established that the following could be taken into consideration in determining whether the award was excessive:

> "[1] Punitive damages should bear a reasonable relation to the harm that is likely to occur from the

defendant's conduct as well as the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.

"[2] The degree of reprehensibility of the defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or cover-up of that hazard, and the existence and frequency of similar past conduct should be relevant in determining this degree of responsibility.

"[3] If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of this profit, so that the defendant recognizes a loss.

"[4] The financial position of the defendant would be relevant.

"[5] All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.

"[6] If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award.

"[7] If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award."

Green Oil Co. v. Hornsby, 539 So. 2d at 223-224 (quoting *Aetna Life Insurance Co. v. Lavole*, 505 So. 2d 1050, 1062 (Ala. 1987) (Houston, J., concurring specially)). The standards set forth in *Hornsby* governed the Alabama Supreme Court's decision in this case. Also, the Alabama Supreme Court routinely conducts a comparative proportionality review to ensure a consistency across the range of cases. *See Aetna Insurance Co. v. Lavoie*, 505 So. 2d

at 1053 (1987). After undertaking such a comparative analysis in this case, the Alabama Supreme Court decided to reduce the jury award from $3,012,400 to $1,000,000.[12] Brief for Petitioner, App., at 16a. Petitioner must concede that the cumulative result of Alabama's system is an award that is comparable to awards in similar cases.

This Court in *Haslip* observed that:

> "This appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition. . . . The application of these standards, we conclude, imposes a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages. The Alabama Supreme Court's post-verdict review ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some relationship to compensatory damages. . . . These standards have real effect when applied by the Alabama Supreme Court to jury awards." —— U.S. at ——.

There can be no doubt, therefore, that InterContinental had the full benefit of procedural due process in this case, for the reasons set forth by this Court in *Haslip*.

InterContinental also argues that the award violated substantive due process, in that the penalty assertedly bears no reasonable relationship to its misconduct. In so arguing, InterContinental places great emphasis on the fact that the award in this case is nearly 80 times the compensatory damages awarded to Ms. Lindblom. Brief for Petitioner, at 12. This argument is based upon the incorrect assumption that the punitive component of the

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[12] Obviously, this type of comparability review could not be conducted by juries, because they will know nothing about awards in similar cases. Responded did not attempt to present evidence of awards in similar cases to the jury, because that evidence could have been highly prejudicial to the petitioner.

jury award can be ascertained.[13] But to the contrary, as in *Haslip*, the verdict here was a general one and could have included a significant share of compensatory damages for pain and suffering. There is simply no way to be certain in *what* ratio the jury awarded compensatory and punitive damages here. The relationship between *out-of-pocket* damages and punitive damages is actually closer here than in *Haslip*; punitive damages awarded in *Haslip* were more than 200 times the out-of-pocket expenses incurred, whereas the ratio in this case is just 80 to 1. There is plainly no basis upon which to find this award "jar[s] one's constitutional sensibilities" under the analysis set forth in *Haslip*.[14]

InterContinental seeks to portray the conduct that harmed respondent as a mere oversight as opposed to some higher degree of wrongdoing.[15] This is a fact-bound attempt to re-litigate the case in this Court. In fact, this case involves deliberate fraud and bad faith carried out by InterContinental in the name of profit. The Alabama Court found the evidence in support of the bad faith claim so "overwhelming" that respondent "would have been entitled to a directed verdict." Brief for Petitioner, App., at 10a.[16] The Alabama Supreme Court found there was ample evidence to support the jury's verdict on *four* separate grounds: "for bad faith failure to pay insurance

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[13] See Section B. The Jury Verdict, *supra*.

[14] —— U.S. at ——. InterContinental also pleads that the penalty in this case is much greater than the criminal and civil fines enacted by the Alabama legislature. *See* Brief for Petitioner, at 11. This position was also taken by the petitioner in *Haslip* and rejected by the Court in part because "imprisonment . . . could also be required of an individual in the criminal context." —— U.S. at ——.

[15] *See* Brief for Petitioner, at 12-13.

[16] The court found, for example, that petitioner "intentionally failed to investigate whether there was a valid reason to deny the claim" and "InterContinental had no legal justification for refusing to pay the claim." *Id.*

benefits, breach of contract, misrepresentation, and fraud". Brief for Petitioner, App., at 9a, 10a, 14a.[17] In short, the award here is justified by the nature of Inter-Continental's conduct, and there is no reason for this Court to reconsider factual findings made by two levels of Alabama courts. Nor is there any reason for this Court to second-guess the Alabama Supreme Court's judgment, applying the factors approved in *Haslip*, that the award in this case was appropriate.

CONCLUSION

For all the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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[17] The court found, for example, that "[c]ontrary to Inter-Continental's interpretation of the facts, the record contains numerous examples of misrepresentations to Ms. Lindblom." *Id.*, at 14a.

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No. 90-1284

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INTERCONTINENTAL LIFE INSURANCE COMPANY,
PETITIONER

v.

LOU R. LINDBLOM, RESPONDENT

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

We agree with respondent that this Court's decision in *Pacific Mutual Life Ins. Co.* v. *Haslip*, No. 89-1279 (decided Mar. 4, 1991), forecloses the first question presented in our petition concerning the constitutionality of Alabama's procedures for awarding punitive damages. But respondent is quite wrong in asserting that *Haslip* is dispositive of the second question—whether the award violates the separate due process prohibition against excessive punitive damages. Rather, because the Court in

Haslip for the first time expressly recognized a due process limitation on the *amount* of punitive damages that may be imposed on a defendant and also gave at least some indication of the contents of that limitation—and because that due process limitation was not applied in this case by the Alabama Supreme Court—further proceedings are warranted. As this Court does whenever it has announced a new rule of law that is relevant to a question presented in a pending certiorari petition, the Court should grant the petition, vacate the judgment below, and remand the case for reconsideration.

1. We think it beyond dispute that this Court in *Haslip* recognized that the Due Process Clause imposes a limit on the amount of punishment that may be inflicted upon a defendant through the medium of punitive damages. Most of the Court's opinion is devoted to the separate question whether Alabama's procedures "impose[] a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages" (slip op. 18). The Court concluded that the Alabama procedures satisfied these standards (*id.* at 18-19) and went on to observe that "Pacific Mutual * * * had the benefit of the full panoply of Alabama's procedural protections" in that the post-verdict review was conducted in accordance with those procedures (*id.* at 19-20).

The Court did not end its opinion at that point, however. It turned—in the last substantive paragraph of its opinion (slip op. 20)—to the question whether "the punitive damages award in this case" was unconstitutionally excessive. (The certiorari petition in *Pacific Mutual* separately presented a chal-

lenge to the excessiveness of the punitive award. See Pet. i (question 3)). The Court compared the amount of punishment imposed on Pacific Mutual with the compensatory damages needed to make Ms. Haslip whole for her injuries and with Alabama's legislatively authorized fines for insurance fraud, sustaining the exaction on the basis that, though it may have been "close to the line," it did not "cross the line into the area of constitutional impropriety" (slip op. 20).[1]

2. The proper disposition of this case follows as a matter of course from the Court's recognition of a due process limit on the amount of punitive damages awards. The Alabama Supreme Court could not have determined whether the amount of the award here is unconstitutionally excessive in light of the considerations identified by this Court in *Haslip* because the lower court did not have the benefit of this Court's decision in *Haslip* at the time it decided this case. Simple fairness requires that petitioner be given the opportunity to present this issue to the Alabama Supreme Court for reconsideration in view of *Haslip*.

The fact that this case, like *Haslip*, comes from the Alabama state courts provides no reason for denying certiorari. *Haslip*'s conclusion that Alabama's procedures satisfy procedural due process

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[1] The Court's determination that the Due Process Clause prohibits excessive punitive damages awards is, of course, in accord with a line of precedent holding that the Due Process Clause is violated by the imposition of excessive penalties, including those imposed in civil actions brought by private parties. See *Browning-Ferris Indus. of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2921 (1989) (citing cases); *id.* at 2923 (Brennan, J., concurring) (citing cases).

does not speak at all to the separate question whether any particular award is unconstitutionally excessive. After all, if the same procedures had been followed in *Haslip* but had produced an award of $10 million or even $2 million, it seems quite clear that this Court, which viewed a punishment of $1 million as "close to the line," would have found a violation of the excessiveness limit imposed by the Due Process Clause. For purposes of deciding whether to vacate and remand a case involving a substantive excessiveness question, there simply is no rational basis for distinguishing between cases from Alabama and cases from other states, many of which were remanded for reconsideration on March 18, 1991. In sum, petitioner should be afforded the opportunity to obtain meaningful review of its claim that the punitive award here is impermissibly excessive under *Haslip*.[2]

3. Finally, a remand in this case would not be an empty gesture. Comparison of the instant case with *Haslip* raises grave concerns about the rationality of the amount of punishment imposed against Inter-

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[2] We note that the Court recently denied certiorari in two Alabama cases seeking review of punitive damages awards. See *General American Life Ins. Co.* v. *Simmons*, No. 90-73 (Mar. 18, 1991); *Massachusetts Mutual Life Ins. Co.* v. *Collins*, No. 90-244 (Mar. 18, 1991). The questions presented in those cases focused on the lack of standards limiting the jury's discretion in fixing the amount of the award—the procedural due process issue conclusively determined in *Haslip*. Because neither petition squarely challenged a punitive award on the separate ground that it was unconstitutionally excessive, that disposition was wholly appropriate. The petition in this case, by contrast, *does* separately raise the excessiveness issue.

Continental for its failure to pay the $10,000 benefit under the policy on Ms. Rodenberry's life. Indeed, given that the amount of punitive damages was "close to the line" in *Haslip*, it surely crosses that line here.

Many of the principal differences in the two cases that require different outcomes are discussed in the petition (at 11-13). We add only the following observations in light of the considerations identified in *Haslip* and the arguments made by respondent in opposition to the petition.

First, the sole amount of compensatory damages sought by respondent against InterContinental in this case consisted of the $10,000 death benefit that was alleged to be due under the policy but not paid (plus interest); the complaint did not ask for additional damages for pain and suffering.[3] R. 70. Thus, it seems clear that respondent's award consists of $12,400 in compensatory damages and the balance of the $1,000,000 total judgment in punitive damages—a ratio of 79 to 1. This contrasts dramatically with the ratio of 4 to 1 that the Court found "close to the line" in *Haslip*.[4]

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[3] The respondent did seek an additional $100,000 in compensatory damages against defendants Milton L. Culver and the Culver Agency in connection with a negligence count not brought against InterContinental. R. 3-4.

[4] Respondent suggests (Opp. 12-13) that it is not possible to ascertain the punitive component of the award because the jury returned a general verdict. But the Court confronted the same situation in *Pacific Mutual* and identified the amount of punitive damages by subtracting from the total award the amount of compensatory damages sought by the plaintiff

Second, there was no dispute in *Haslip* that Pacific Mutual's agent was guilty of egregious misconduct that caused serious embarrassment, inconvenience, and anguish to Ms. Haslip. (The only question before the Court was whether the concededly outrageous conduct was ascribable to Pacific Mutual for purposes of punishment.) Try as she may, respondent's attempt to equate the "misconduct" here with that in *Haslip* is unavailing. There was not even arguably any fraud in the instant case, simply an unjustified failure to investigate adequately and to pay what in the end was held to have been a valid claim for insurance benefits.

Our discussion of the degree of InterContinental's culpability is not, contrary to respondent's suggestion (Opp. 13), an attempt to "re-litigate the case in this Court." We do not question the facts found be-

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(slip op. 3 n.2). The same approach can and should be utilized here.

Respondent also suggests (Opp. 13) that the punitive damages are no more disproportionate here than they were in *Haslip* because in that case the total verdict was over 200 times greater than the plaintiff's out-of-pocket expenses (unreimbursed hospital costs). This argument overlooks the fact that here respondent had *no* out-of-pocket expenses. In any event, this Court made it quite clear in *Haslip* that it was not treating the case as one with a 200 to 1 ratio. The Court explicitly noted that Haslip's counsel sought $200,000 in compensatory damages for the suffering caused to his client by the hospital's reaction to her uninsured status, leaving not less than $840,000 in punitive damages. It then stated that "[f]or present purposes, we accept this description of the verdict"—which, in context, surely means that the case was being treated as one involving a ratio of punitive to compensatory damages of slightly over 4 to 1. Slip op. 3 n.2; see also *id.* at 20.

low; we simply address those findings because they bear upon the rationality of the punishment inflicted upon InterContinental. Any misconduct here plainly was far less deserving of punishment that the misconduct in *Haslip*.

In closing, this case involves a substantially greater ratio of punitive to compensatory damages than that in *Haslip*, imposed for conduct that was far less worthy of punishment. If the due process right recognized in *Haslip* to be free of irrationally excessive punishment is to be afforded any content whatever, this judgment must be substantially reduced. And more to the present point, InterContinental should be afforded the opportunity to have its arguments considered by the Alabama courts in the new light shed by the *Haslip* decision.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment below vacated, and the case remanded for reconsideration in light of *Haslip*.

Respectfully submitted.

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